judge. Subsequently the Circuit Court of the United States took, by way of removal, jurisdiction over the prosecution. The Commonwealth of Virginia applied to this court for a mandamus to remand the prosecution and to restore the accused to the custody of the State authorities. The court, reaffirming the doctrine of *Virginia* v. *Rives*, pointed out that to wrongfully divest the State of its right to prosecute in its own courts for crimes committed against its authority was a gross abuse of discretion, which if not corrected by mandamus could not be done in any other form. A mandamus to remand was issued. The court, however, declined to review the order discharging on *habeas corpus*, on the ground that on the face of the application for *habeas corpus* issues had been presented which the judge had a right to decide, and if error was committed there was a remedy by appeal.

In *Ex parte Wisner*, 203 U. S. 449, mandamus was sought to compel a Circuit Court of the United States to remand a civil cause to the state court from which it had been removed and which the Circuit Court had refused to remand. The case was one where, although there was diversity of citizenship, neither of the parties resided in the particular district to which the suit had been removed. This court took jurisdiction. Reviewing the action of the court below, it was observed that the absence of residence within the district of either of the parties demonstrated the absolute want of authority of the Circuit Court over the cause, and that even if the objection was susceptible of being waived, a waiver by both parties was essential, and the record did not disclose that there had been such waiver. Considering the right to revise by mandamus the action of the Circuit Court in refusing to remand, no reference whatever was made to the existence of statutory remedies to correct the error found to have been committed, and no authority was cited, it being simply observed: "Our conclusion is that the case should have been remanded, and,

as the Circuit Court had no jurisdiction to proceed, that mandamus is the proper remedy."

In re Moore, 209 U. S. 490, was also a case of removal, where there was diversity of citizenship but neither of the parties resided in the particular district. The Circuit Court had refused to remand. Taking jurisdiction to review such action, on application for a writ of mandamus, this court held that as there was diversity of citizenship there was general jurisdiction in the Circuit Court, and that the objection that neither party resided within the district was a matter susceptible of being waived by the parties and that such waiver had taken place. The observations in *Ex parte Wisner* to the contrary were expressly disapproved. The action of the Circuit Court in refusing to remand was consequently approved. No discussion was had or authority referred to upon the question of the right to review by mandamus the action of the Circuit Court, the right to exert such authority having in effect been assumed as the result of the decision in the Wisner case.

In *In re Winn*, 213 U. S. 458, an action commenced in a state court had been removed into a Circuit Court of the United States, not upon diversity of citizenship, but upon the ground that the case stated was one arising under the laws of the United States. The Circuit Court denied a motion to remand. Upon application for mandamus this court took jurisdiction to review such action and directed that the case be remanded, upon the ground that the cause of action when rightly construed did not arise under any provision of the Constitution or under any law of the United States. Referring to some of the previous cases, and manifestly noting an apparent conflict between them, it was said that this court had declined to exert jurisdiction by mandamus in *Ex parte Nebraska* and *In re Pollitz*, because those cases but exemplified the exercise of judicial discretion by the Circuit Court as to a matter within

its jurisdiction, while the case in hand presented a question of a want of jurisdiction in the Circuit Court, clearly apparent on the face of the record, and therefore that court when it decided that the cause of action alleged arose under a law of the United States, could not possibly have exercised a discretion to decide a matter which was within its jurisdiction. *Virginia* v. *Rives* and *Virginia* v. *Paul* were approvingly cited, and it was said that in case of a refusal to remand, "although the aggrieved party may also be entitled to a writ of error or appeal," mandamus may be resorted to. On this subject it was further observed: "Mandamus, it is true, never lies where the party praying for it has another adequate remedy, . . . but where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy."

Comprehensively considering the two lines of cases, one beginning with *Ex parte Hoard*, 105 U. S. 578, and ending with *Ex parte Gruetter*, 217 U. S. 586, and the other beginning with *Virginia* v. *Rives*, 100 U. S. 313, and ending with *In re Winn*, 213 U. S. 458, it is to be conceded that they are apparently in conflict, both as to the assertion of power which one line upholds to view by mandamus the action of the United States Circuit Court in refusing to remand and the non-existence of such power which the other line of cases expounds, and also as to much of the reasoning in the opinions in some of the cases. Thus the ruling in *Ex parte Hoard*, that where in a civil case statutory remedies by error or appeal are provided for the ultimate review of errors committed by a court in determining its jurisdiction, such statutory provisions are, in their nature, exclusive, and therefore deprive of the right to resort to the remedy by mandamus, is directly in conflict with the jurisdiction which was exercised in *Ex parte Wisner*, *In re Moore* and *In re Winn*, as those cases were civil cases, and the right

to review the error, if any, committed by the Circuit Court in refusing to remand was regulated by statute. So also the statement, by way of reasoning, in the opinion in *In re Winn*, to the effect that in case of a refusal to remand "the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or appeal," is in direct conflict with the reasoning upon which the decision in *Ex parte Hoard* was based. The conflict just stated becomes more manifest when the ruling in *Virginia* v. *Paul* is considered, since in that case the court declined by mandamus to review the action of the court below in taking one accused of crime by a writ of *habeas corpus* from the custody of the state authorities, on the ground that *prima facie* there was jurisdiction to issue the writ of *habeas corpus*, and a remedy by appeal existed to review the action of the Circuit Court. Moreover, the decision in *In re Pollitz*, that there was not power to review the action of the court below in refusing to remand because the Circuit Court, in passing upon the question as to whether, on the face of the papers, a separable controversy was alleged decided a matter within its jurisdiction, and which involved the exercise of judicial discretion, cannot be harmonized with the ruling in *Ex parte Wisner* and *In re Moore*, that the action of a Circuit Court in refusing to remand could be reviewed by mandamus, because the court, in deciding whether the parties had waived the right to be sued in a particular district, had not been called upon to decide a matter within its jurisdiction involving the exercise of judicial discretion. This conflict becomes more obvious when the ruling in *In re Winn* and *Ex parte Gruetter* are contrasted, the one deciding that the action of the Circuit Court in refusing to remand because, from an analysis of the pleadings, it was found that a claim of Federal right was presented, was reviewable by mandamus, since it was plain, as a matter of law, that the court erred, and therefore its decision involved no element of judicial discretion, and

the other deciding that the denial by a Circuit Court of a motion to remand based upon the ground, among others, that on the face of the papers the suit was not removable, because it was not of a civil nature, but was for a penalty, was not reviewable by mandamus, because the decision of such a question was within the jurisdiction of the Circuit Court, and therefore involved the exercise of judicial discretion.

We must then either reconcile the cases or if this cannot be done determine which line rests upon the right principle and having so determined overrule or qualify the others and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty. Coming to the origin of the two lines of cases it is manifest that it was not conceived that there was conflict between them, since *Virginia* v. *Rives* and *Ex parte Hoard* were practically contemporaneously decided and were treated, the one as relating to an exceptional condition, that is, an effort to remove a criminal prosecution which if wrong was committed no power otherwise to redress than by mandamus existed, and the other but involved the application of the well-settled rule as to civil cases concerning which the right to review by error or appeal was generally regulated by statute. Following down the two lines of cases it is equally manifest that it was never conceived that they conflicted with each other, because some of the cases were also practically contemporaneously decided without the suggestion that one was in conflict with the other; indeed, the decisions in *In re Moore* and *Ex parte Nebraska* were announced on the same day. When the cases are closely analyzed, we think the cause of the conflict between them becomes at once apparent. As we have previously pointed out, no authority was referred to in *Ex parte Wisner* sustaining the taking in that case of

jurisdiction to review by mandamus the ruling of the Circuit Court, although in the course of the opinion the statement was made with emphasis that the face of the record disclosed an entire absence of jurisdiction in the court below. In the opinion, however, in *In re Pollitz* the Wisner case was referred to and in pointing out why it was not apposite and controlling it was observed that that case (the Wisner) presented a total absence of jurisdiction, involving no element of discretion, and *Virginia* v. *Rives* was cited, manifestly as indicating the basic authority on which the jurisdiction to review by mandamus had been exerted in the Wisner case. Again, in *In re Winn* it is to be observed that not only was *Virginia* v. *Rives* cited, but the cases of *Virginia* v. *Paul* and *Kentucky* v. *Powers*, 201 U. S. 1 (the last of which also concerned a criminal prosecution in which the doctrine of *Virginia* v. *Rives* had been applied), were also cited, evidently for the purpose of pointing out the source from whence came the doctrine of the right to review by mandamus under the facts presented. Bearing these matters in mind it plainly results that the conflict presented has arisen, not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction, or of any wrongful decision of any of the cases on the merits, but has simply been occasioned, beginning with *Ex parte Wisner*, from applying the exceptional rule announced in *Virginia* v. *Rives* to cases not governed by such exceptional rule but which fell under the general principle laid down in *Ex parte Hoard* and the line of cases which have followed it. Under these circumstances it becomes our plain duty, while not questioning the general doctrine announced in any of the cases, yet to disapprove and qualify *Ex parte Wisner*, *In re Moore* and *In re Winn* to the extent that those cases applied the exceptional rule of *Virginia* v. *Rives*, and thereby obscured the broad distinction between the general doctrine announced in *Ex parte Hoard* and the cases which have followed it and the

exception established by *Virginia* v. *Rives* and the cases which have properly applied the doctrine of that case. Our duty to take this course arises not only because of the misconception which must otherwise continue to exist, but also because it is to be observed that material portions of the act of 1875, which were made the basis of the ruling in *Ex parte Hoard*, are yet in force, and because the cogency of the considerations arising from this fact are greatly increased by the duty to give effect to the provisions of the judiciary act of 1891 concerning the review of final orders and judgments or decrees of the Circuit Courts of the United States.

As then our conclusion is that the case under consideration is not controlled by the ruling in *Ex parte Wisner* or kindred cases, but is governed by the general rule expressed in *Ex parte Hoard* and followed in *In re Pollitz* and *Ex parte Nebraska*, and, lastly, applied in *Ex parte Gruetter*, it clearly results that the application for leave is without merit, and

Leave to file is denied.